DEPARTMENT OF COMMERCE

IN THE MATTER OF: The claim for reimbursement under the PECFA Program by

Anthony Roskopf

MADISON HEARING OFFICE
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Hearing Number**:** 99-223
Re: PECFA Claim # 53051-1401-06

PROPOSED HEARING OFFICER DECISION

NOTICE OF RIGHTS

Attached are the Proposed Findings of Fact, Conclusions of Law, and Order in the above-stated matter. Any party aggrieved by the proposed decision must file written objections to the findings of fact, conclusions of law and order within twenty (20) days from the date this Proposed Decision is mailed. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your objections and argument to: Madison Hearing Office, P.O. Box 7975, Madison, WI 53707-7975. After the objection period, the hearing record will be provided to the Executive Assistant of the Department of Commerce, who is the individual designated to make the FINAL decision of the department in this matter.

STATE HEARING OFFICER:

Gretchen Mrozinski

DATED AND MAILED:

January 3, 2002

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MAILED TO:

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STATE OF WISCONSIN
DEPARTMENT OF COMMERCE

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In the matter of the PECFA Appeal of:

Anthony Roskopf
Roskopf7s RV Center LTD
W164 N9306 Water Street
Menomonee Falls, W1 53051-1401

PECFA Claim # 53051-1401-06
Hearing # 99-223

PROPOSED DECISION

A decision by the Department of Commerce ("Department") concerning the Petroleum Environmental Cleanup Act ("PECFA") was issued on September 22, 1999, denying $22,988.48 in reimbursement for a claim submitted by Anthony Roskopf, d.b.a. Roskopf's RV Center LTD ("claimant"). The claimant timely appealed. A hearing was held on February 7 and 20, 2001, before Administrative Law Judge Gretchen Mrozinski. Following the hearing, written briefs were received from the claimant and the Department.

FINDINGS OF FACT

In 1995, Fluid Management, now Envirogen, Inc. (for purposes of this decision, both companies will hereinafter be referred to as the "consulting firm") performed a closure assessment during the removal of two USTs from the claimant's property (the "site"). Thereafter the claimant contracted with the consulting firm for the remediation of the site. The consulting firm prepared a Site Investigation Work Plan ("SIWP") in August 1996. The SIWP mentioned that it would evaluate remedial options "with respect to technical feasibility." In February 1997, the consulting firm completed the Site Investigation Report ("SIR"). The SIR indicated its purpose was to "determine the extent and degree of the soil contamination discovered during UST removal activities conducted at the site." The SIR also indicated that "the most feasible and cost-effective remedial option" would be designed for the site. Neither the SIWP nor the SIR mentioned feasibility activities occurring concurrently with the investigation activities.

In May 1997, the claimant submitted a Remedial Options Report ("ROR") to the Department which made various references to feasibility testing, studies and analysis conducted at the site. The ROR stated that the claimant had incurred $37,000 in feasibility costs to date. The ROR indicated that the consulting firm installed two "feasibility-Geoprobe borings . . . to collect data for site-specific soil standard development."

The claimant submitted his PECFA claim in July 1997. The claim amounted to $66,557.11. On the Remedial Action Fund Application submitted by the claimant, the claimant indicated that total costs incurred on this claim were $38,857.15 for site investigation and $27,699.96 for remedial action. As required by law, the claimant also attached copies of invoices to substantiate the costs incurred. The invoices contained 256 individual line items and detailed what work was performed such as "data

reduction and analysis" or "site project management" or "installation of test borings." The work was performed from January 1996 through March 1997. However, such invoices did not detail whether the work performed was for feasibility testing. In fact, the invoices referenced site investigation work, but did not reference feasibility testing. Nothing in the claim mentioned what work pertained to feasibility testing or what costs were feasibility testing costs**.**

The Department reviewed the claim and approved $39,015.20 of costs to be reimbursed pursuant to the PECFA program. The Department denied $22,988.48 of costs because the Department determined those costs to be in excess of the $40,000 cap found in Wis. Admin. Code § ILHR 47.335.

At the hearing, the claimant produced the consulting firms' project manager as a witness. The claimant conceded that certain costs could be characterized as either feasibility or site investigation because the work that generated the cost could be used for either purpose. However, the project manager testified that he was able to look at the invoices and remember which costs were for feasibility testing and which costs pertained to site investigation, as he was the project manager for the site at issue. The project manager admitted that each employee whom he supervised submitted weekly time sheets and that those time sheets identified by a job code whether activities were related to site investigation or feasibility testing. However, the claimant did not produce such time sheets for the hearing.

APPLICABLE LAW

Wis. Stat. § 101.143(3)(f), provides with regard to the submission of am application for PECFA grant, that the claimant

> shall submit a claim on a form provided by the department. The claim shall contain ail of the following documentation of activities, plans and expenditures associated with the eligible costs incurred because of a petroleum products discharge from a commercial petroleum product storage system:
>
> 1. A record of investigation results and data interpretation.
> 2. A remedial action plan.
> 3. Contracts for eligible costs incurred because of the discharge and records of the contract negotiations.
> 4. Accounts, invoices, sales receipts or other records documenting actual eligible costs incurred because of the discharge.
> 5. The written approval of the department of natural resources under par. (c)4.
> 6. Other records and statements that the department determines to be necessary to complete the application.

This provision has been in the statute since the program was first created by 1987 Wis. Act 399. It has remained essentially unchanged since that time except for changes in the last couple years to provide for written approval by either DNR or Commerce, depending on which agency has responsibility for the site. Except for this change to 5., the application requirements have remained as initially written in 1987.

Once an application as described above is submitted, the department is responsible for making PECFA grant awards as follows.

If the department finds that the claimant meets all of the requirements of this section and any rules promulgated under this section, the department shall issue an award to reimburse a claimant for eligible costs incurred because of a petroleum products discharge from a petroleum product storage system or home oil tank system.

Wis. Stat. §101.143(4)(a)1.

The statute defines certain eligible costs including the following:

2. Removal of petroleum products from surface waters, groundwater or soil.
3. Investigation and assessment of contamination caused by a petroleum product storage system or a home oil tank system.
4. Preparation of remedial action plans.
5. Removal of contaminated soils.
6. Soil treatment and disposal.
7. Environmental monitoring.
8. Laboratory services.

Wis. Stat. §101.143(4)(b).

The statute also lists certain costs which are ineligible for reimbursement, including:

1. Costs incurred before August 1,1987.
2. Costs of retrofitting or replacing a petroleum product storage system or home oil tank system.
3. Other costs that the department determines to be associated with, but not integral to, the eligible costs incurred because of a petroleum products discharge from a petroleum product storage system or home oil tank system.
4. Costs, other than costs for compensating 3rd parties for bodily injury and property damage, which the department determines to be unreasonable or unnecessary to carry out the remedial action activities as specified in the remedial action plan.

Wis. Stat. §101.143(4)(c).

Wisconsin Admin. Code § ILHR 47.015 (35) defines "Site Investigation" as:

> [T]he investigation of a petroleum product discharge to provide the information necessary to define the nature, degree and extent of a contamination and to allow a remedial action alternative to be selected.

Wisconsin Admin. Code § ILHR 47.12(1)(f) and (h) and (j) provide:

> APPPLICATION. A claimant shall submit a claim on a Remedial Action Fund Application Form (SBD-8067) furnished by the department, and shall include the following:
>
> (f) Documentation verifying actual costs incurred because of the petroleum product discharge, which shall include receipts, invoices including contractor's

and subcontractor's invoices, interest costs, loan fees, accounts, and processed payments;

(h) Properly detailed and itemized receipts for remedial activities and services performed;

(j) Other records or statements that the department determines to be necessary to complete the application.

Wisconsin Admin. Code § ILHR 47.335 provides:

(1) GENERAL. Site investigations which have not been started as of January 15, 1993, shall conform to this section.

(2) MAXIMUM ALLOWABLE COST. The maximum allowable cost for a site investigation and the development of a remedial action plan shall be no more than $40,000, excluding interest, feasibility testing, arid interim action costs, unless approved under par. (a).

(a) If the investigation will exceed $40,000, the responsible party or its agent, shall contact the department in writing and provide an estimate of additional work and funding required and obtain the department's approval. If the additional approval is not obtained, costs above the $40,000 level will not be reimbursed.

(b) The consultant is responsible for monitoring the costs incurred in the investigation and remedial plan development and identifying that the $40,000 maximum may be exceeded. The consultant shall notify the owner, in writing, at the earliest point at which the consultant may know, or may have been reasonably expected to know, that the maximum allowable cost may be exceeded and that the approval of the department shall be obtained before any costs above $40,000 will be reimbursed by the department. The notification to the owner shall be made before the owner has incurred liabilities above the $40,000 maximum.

(3) CONS1DERAT1ON OF AETERNATIVES.

(a) The remedial actionplan developed for the site shall include a consideration of at least 3 alternatives, one of which shall be passive bio-remediation with long-term monitoring. The consideration of alternatives shall include a basic comparison of costs and the recommended alternative shall have a detailed cost estimate. If passive bioremediation with long-term monitoring is feasible but not the recommended alternative, a clear rationale shall be provided as to why this alternative is not acceptable. Costs of long-term monitoring or operation and maintenance shall be included in the comparison of costs in considering the alternatives.

(b) If the consideration of the passive bio-remediation or monitoring alternative shall be excluded because of site characteristics, the alternative shall be replaced by consideration of another alternative. If an alternative is substituted for the passive bio-remediation or monitoring alternative, the reason for this change shall be documented in the analysis.

(c) 1. The comparison of alternatives shall be a concise document written so that the responsible party and the department may easily compare altematives. Only alternatives which are reasonably expected to be approved by the DNR may be included in the comparison. The comparison of alternatives shall be submitted to both the DNR and the department if the selected alternative is greater than $80,000. The comparison submitted to the department shall not include the full remedial action plan, unless requested by the department.

2. If the comparison document is determined by the department to be excessive or non-approvable altematives are included, the department may require that the comparison be revised and resubmitted.

(4) START OF INVESTIGATION. An investigation shall be considered started if, after confirmation of a contamination is obtained, and additional soil borings, soil sampling or monitoring-well construction have begun. In addition, the work on the site shall have an element of continuity.

The issue is whether the costs denied by the Department are feasibility testing costs which are therefore reimbursable to the claimant by the Department.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

The Department and the claimant agree that Wis. Admin. Code § ILHR 47.335 differentiates between site investigation and feasibility testing. The parties also agree that feasibility testing is not subject to the $40,000 cap found in Wis. Admin. Code § ILHR 47.335. However, the parties disagree as to what costs are properly characterized as feasibility testing costs and what costs are properly characterized as site investigation costs. This decision does not undertake to exhaustedly define what costs are properly placed in either category. Nevertheless, this decision affirms the initial determination because the claimant did not prove at the claim stage or during the hearing that the costs denied by the Department qualify as feasibility testing costs.

The Claimant had the burden of proving that the costs denied by the Department are reimbursable under the PECFA program. The claimant did not meet this burden of proof The claimant had the duty of properly documenting eligible costs when he submitted his claim. See Wis. Stat. § 101.143(3)(f)4. The claimant did not properly document what costs were feasibility testing costs and what costs were site investigation costs when he submitted his claim. As such, the department properly denied portions of his claim.

While it is true that the PECFA rules except "feasibility testing" from the costs subject to the $40,000 cap in Wis. Admin. Code § ILHR 47.335, such rules do not define what is feasibility testing and how such costs differ from site investigation costs. However, "site investigation" is defined. See Wis. Admin. Code § ILHR 47.015(35). Therefore, if the claimant desired that a cost be reimbursed as a feasibility testing cost, he has the burden of proving that such cost is not a site investigation cost and is in fact a feasibility cost. To meet this burden, he had to accomplish several things. First, he had to prove to

the Department that the work in question was actually performed as a result of feasibility testing and not site investigation.

Second, he had to prove what the exact costs were oft his work. He did not.

The persuasive evidence established that feasibility testing and site investigation can involve the same work. For instance, a consultant may travel to the site to perform tests for feasibility testing. The next day, he or she might travel to the site to perform site investigation. The traveling involves the same work—but used for different purposes. Moreover, the claimant admitted in his post-hearing brief (page 16) that "it is possible that some of this data [pertaining to data collected from soil borings, aquifer testing, etc], when considered in another context at another site, could have been gathered for site investigation purposes." Therefore, how is the Department supposed to determine if a cost that is usually associated with site investigation should instead be categorized as a feasibility testing cost? The Department is not in the business of guessing or reading minds. The claimant is the moving party seeking reimbursement. Therefore the claimant must supply the Department with enough information so that the Department can determine what costs are associated with site investigation and what costs are feasibility testing costs. To accomplish this, proper documentation must be submitted. The claim to the Department included many invoices that documented much work, but did not differentiate whether that work was performed as part of the feasibility testing or site investigation. The Department reviewed these invoices, saw that the work was work that is generally incurred during site investigation, and evaluated the invoices accordingly. The Department added up the totals and found that the claimant had exceeded the $4O,000 cap. Nothing in the actual claim itself alerted the Department that the claimant considered the excess of $40,000 to apply to feasibility testing costs. In fact, on the Fund Application, the claimant indicated that all of the costs in question were for site investigation and remedial action. Nothing was noted on the Fund Application that the claimant considered some of the costs to be associated with feasibility testing. Such a matter should have been noted given the rarity in which feasibility testing costs are actually claimed by claimants. In addition, the Department was not under any duty to review the claimant's SIR or ROR to determine if the excess could be properly characterized as feasibility testing costs. Again, it bears repeating that the claimant had the duty to properly document his submitted claim. If he relied on his earlier documents, the SIR and ROR to substantiate his claim, he was mistaken.

Yet even if the Department had again reviewed during the claim approval stage-the claimant's SIR and ROR to determine if costs in excess of $40,000 could somehow be characterized as feasibility testing costs and therefore covered by the PECFA program, those documents would not have been enough to substantiate the claimant's claim. The claimant was required to submit documents that clearly showed what costs were properly characterized as feasibility testing and what costs were properly characterized as site investigation. A general statement that the claimant was performing feasibility testing and that such testing produced approximately $37,000 worth of costs at that time (see ROR), is not enough to establish what those exact cost were, when they were incurred and what invoices belonged to those costs. As such, the claimant did not properly document his claim.

The failure to properly document one's claim generally cannot be cured at the hearing stage. The claimant had the duty to make sure everything was in order when he submitted his claim. PF.CFA rules and regulations have deadlines and requirements that cannot be extended or waived merely because a party files an appeal. Nevertheless, this tribunal will note that even at the hearing state, the claimant did not prove that the costs in question qualify as feasibility costs.

The claimant's consultant took the stand and testified that he remembered in detail what work (work that was performed by his associates) was performed as part of feasibility testing and what work was performed as site investigation. He testified that he could accurately identify which of the 256 individual line items on the invoices should be allocated to feasibility testing. This testimony was not credible for several reasons. First, the work occurred four or more years prior to the hearing at issue. Second, he performed little to none of the work in question-his coworkers performed the work and such coworkers were not witnesses at the hearing. Third, the consultant is responsible for managing multiple sites, which produce hundreds of invoices, which are submitted in dozens of PECFA claims. No one can remember all of the details of so many claims. Fourth, the consultant testified that his coworkers who did the work were required to maintain timesheets specifically identifying whether they were performing feasibility testing or site investigation. The claimant did not produce such documents for the hearing. As such, this tribunal has chosen to draw an adverse inference against the claimant based upon the "missing" timesheets. Finally, the consultant's testimony conflicted with the actual invoices and reports received in the record. Accordingly, the claimant was unable to identify with accuracy what costs were properly attributable to site investigation and what costs were attributed to feasibility testing.

Under such circumstances, this tribunal finds that the Department properly denied the costs in question.

DECISION

The Department's decision of September 22, 1999 is affirmed.

APPEAL TRIBUNAL

Gretchen Mrozinski
Administrative Law Judge